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No. 90-1496

FILED
APR 29 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

DONALD STEEG and IRENE STEEG,
his wife,
Petitioners,

v.

CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS,
and LOUIS DOLLIAN,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

CUMMINGS, MCCLOREY, DAVIS & ACHO, P.C.
By: MARCIA L. HOWE (P-37518)
Counsel of Record
33900 Schoolcraft
Livonia, Michigan 48150-1392
(313) 261-2400

Attorneys for Respondents

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT PROPERLY ENTERED A JUDGMENT NOTWITHSTANDING THE VERDICT FOR THE DEFENDANTS WHERE THE PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A CONSTITUTIONAL VIOLATION PURSUANT TO 42 USC 1983 WHERE THE PLAINTIFFS WERE MORE THAN ADEQUATELY PROVIDED WITH DUE PROCESS PRIOR TO THE DEMOLITION OF THEIR PROPERTY?

II.

WHETHER THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON PLAINTIFFS' CLAIM ALLEGING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WHERE THE PLAINTIFFS WERE UNABLE TO ALLEGE OR SUPPORT CLAIMS OF OUTRAGEOUS CONDUCT AGAINST THE DEFENDANTS AND WHERE ANY SUCH CLAIM IS BARRED BY THE GOVERNMENTAL IMMUNITY DOCTRINE?

III.

WHETHER THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR DIRECTED VERDICT WHERE PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A *PRIMA FACIE* CASE OF INVERSE CONDEMNATION?

IV.

WHETHER, ALTERNATIVELY, THIS COURT SHOULD REVERSE THAT PORTION OF THE APPELLATE DECISION ENUNCIATING THE PROPOSITION THAT PLAINTIFFS NEED NOT SEEK REDRESS IN ADMINISTRATIVE/STATE PROCEEDINGS AS A PREREQUISITE TO SEEKING DAMAGES?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Respondents, CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS and LOUIS DOLLIAN, request that this Honorable Court deny Petitioners', DONALD STEEG and IRENE STEEG, Request for a Writ of Certiorari to review the Order of the Michigan Supreme Court entered on December 26, 1990, which denied Plaintiffs' Application for Leave to Appeal. Respondents received the Petitioners' Petition for Writ of Certiorari on March 19, 1991. The Petition was docketed at the United States Supreme Court on April 1, 1991.

ORDERS AND OPINIONS BELOW

Respondents rely on the Orders and Opinions submitted in Petitioners' Petition for Writ of Certiorari and its Appendices.

JURISDICTION

This case involves only *one federal* civil rights action brought pursuant to 42 U.S.C. 1983 asserting a due process violation under the 14th Amendment as a result of the demolition of the Petitioners' property. At the trial level, the Plaintiffs also attempted to plead state claims of condemnation, inverse condemnation, and intentional infliction of emotional distress.

The Plaintiffs did not challenge the proceedings below based upon the 5th and 7th Amendments, but focused the matter at trial on 42 U.S.C. 1983 allegedly arising out of the 14th Amendment due process claim.

The Plaintiffs' jury verdict was set aside by the trial court in the Order Granting Defendants' Motion for a Judgment Notwithstanding the Verdict. The state claims had been dismissed by dispositive motions filed and granted prior to the conclusion of trial.

The Michigan Court of Appeals entered an opinion affirming the trial court's decision. Plaintiffs unsuccessfully sought leave to the Michigan Supreme Court.

COUNTER-STATEMENT OF THE CASE

The Plaintiffs/Petitioners have clearly misstated the facts that have occurred in this case and for that reason, Defendants/Respondents request this Court's patience in permitting the Respondents to set forth those facts that became apparent during the trial.

In 1964, DONALD STEEG, at that time a single man, purchased a parcel of residential property on Beech Daly Road in Dearborn Heights. He subsequently married Irene Steeg. They lived in the house on Beech Daly until 1971. At that time, the Petitioners purchased another home and began

utilizing the home on Beech Daly as an income-producing duplex. The occupancy of the Beech Daly property as a residence was a nonconforming use.

The sequence of events with respect to the Beech Daly property was well documented in the exhibits submitted at trial. Officer Louis Dollian, a City Ordinance Officer, was in charge of writing most of the violations for the building department and checking all vacant houses. His superior was Mr. Briggs, the Director of the Building Department. He also reported to another boss in the Police Department.

Respondent DOLLIAN's first contact was a result of a complaint. At that time, the Officer warned the Petitioners that the Building Department's records showed the Petitioners failed to obtain a Certificate of Occupancy, ("C of O"). Ordinance 8.668 required that every home obtain a Certificate of Occupancy. After the warning was not heeded, Petitioners were issued a ticket on June 19, 1981 for failure to obtain a "C of O." A hearing on the ticket was scheduled for September.

Later in June, 1981, the Petitioners requested that the City perform inspections at Petitioners' expense for the purpose of obtaining a "C of O," or for the purpose of bringing the premises up to code for resale. Although a dozen or so violations of the building code were cited against the property, Mr. Steeg estimated that the actual cost of the materials would amount to only $300.00. In response, Mr. Steeg pulled a plumbing and electrical permit. Mr. Steeg, however, failed to notice on these reports that his property was being utilized as a non-conforming use. The property was zoned light commercial, but Petitioners were renting the premises for residential purposes.

The day before the hearing, complaints were received from citizens with regard to the numerous trailers which

the tenants had parked on the premises. The complaints with respect to the use of the property by the tenants became moot when the Plaintiffs were found in violation of the ordinance requiring a "C of O" on September 24, 1981 and the state district court judge ordered eviction. Ordinance 8.613 reads as follows:

> 8.613. *Notice of Violation*. Whenever the Building Inspector determines that there exists a violation of any provision of this Code or of any rule or regulation adopted pursuant thereto, he shall give notice of such violation to the person or persons responsible therefor and order compliance. Such notice and order shall:
>
> 1). Be in writing.
>
> 2). Include a list of violations referring to the sections of the Code violated.
>
> 3). Contain an outline of remedial action which, if taken will effect compliance with the provisions of this Code.
>
> 4). Set a reasonable time, not to exceed 90 days in any event, for compliance.
>
> 5). Advise the owner or occupant of the procedure for appeal.
>
> 6). Be served upon the owner, his agent, or the operator, or occupant by delivering the same at his residence, office or place of business with some person of suitable age and discretion who shall be informed of the contents thereof, or by mailing a copy thereof by certified mail to his last known address, or if the person to be served is unknown, by positing said notice in some conspicuous place on the premises.

> 7). If necessary, and anything herein to the contrary notwithstanding, also require the dwelling or portion thereof to be vacated forthwith and not reoccupied until the required repairs and improvements are completed, inspected and approved by the Building Inspector.
>
> * * *
>
> The Ordinance, 8.668, provides that if a house is sold, occupied, reoccupied or purchased, the house must be recertified.

Mr. Steeg pled guilty and did not appeal the conviction for failure to have a "C of O." He alleged that he did not understand his rights for appeal of his plea. He never obtained an attorney because he did not feel it was a serious problem.

Mr. Steeg failed to notice that the Inspection Reports listed his property as being zoned commercial and further, that the current use was non-conforming. He never inquired into zoning. Mr. Steeg made no request for a re-inspection. Although Mr. Steeg did speak with the Building Inspectors, he did not make any great attempts to bring the house up to code.

In June, 1982, approximately one year after the issuance of the ticket for failure to have a "C of O," Plaintiff alleged that Defendant Officer Dollian prohibited the Plaintiff from working on the house. The Plaintiff believed he was informed that his house was "red tagged," although he has no written documentation of this occurrence.

Defendant Officer Dollian testified that he did not tell the Plaintiff in June of 1982 that he could not work on the house. Officer Dollian did not recall seeing the Plaintiff after the 1981 hearing. In 1983, however, he had written a

ticket for the Steegs' failure to cut the grass.[1] Officer Dollian testified that it would not be his job to inform the Plaintiff he could not work on the house. The officer testified that he did not recall a request for a ticket by Mr. Bedwell and that the City files do not reflect any issuance of a stop work order.

The Steegs admit learning of the non-conforming use status of the home by Mr. Briggs in either June of 1982, or in the fall of 1982. On October 13, 1982, a letter was written from the Building Department to the Plaintiff informing him that his non-conforming use was forfeited. Mr. Briggs also testified that he had never informed the Plaintiff that he could not fix up his house. The Plaintiff was ordered to stop tearing out the floor because he had not obtained the requisite permit. Apparently, a stop work order was issued by a field inspector, but Mr. Briggs does not recall any more than that.

On November 12, 1982, an Investigation Report was presented to Defendant Briggs. Defendant Officer Dollian indicated in his report that the home on Beech Daly was vacant, left wide-open, and being utilized by kids. It constituted a safety hazard.

In response to the letter informing them of their loss of the non-conforming use, the Plaintiffs sought a hearing in front of the Zoning Board of Appeals in April, 1983. The Plaintiffs actually attended a hearing in front of the Zoning Board of Appeals in May, 1983. The entire Board was present, Mr. Steeg testified, and the Board was permitted to ask questions. At the hearing, there was a Motion by the Zoning Board of Appeals to allow the Plaintiffs to revert

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[1] Just as the officer had finished writing the ticket, the Plaintiff, DONALD STEEG, arrived to cut the grass. (*Id*). Although the officer was unable to dismiss the ticket because of the department policy to prevent ticket fixing, he did note on the ticket that the Plaintiff arrived to cut the grass. As a result, the ticket was dismissed. (*Id*).

to the non-conforming use for a period of six months. Although the Plaintiffs requested an additional period of only two weeks, the Board would only vote on a period of six months. The Plaintiffs were not successful and the Zoning Board of Appeals denied their request for the variance.

At that hearing, Defendant Briggs, Director of the Building Department, testified that no major infractions on the house were apparent, the house was solid and sound, and the infractions could be easily repaired. Despite the support by the Building Department, the Zoning Board of Appeals denied Plaintiffs' request. The Building Department encouraged and informed Plaintiffs of their right to appeal.

Although the Plaintiffs initiated an appeal of that decision, the Plaintiffs abandoned their appeal. Not comprehending the appeal procedure time requirements, Mr. Steeg testified that the instant civil action could be characterized as his appeal of the Zoning Board of Appeals' decision.

With regard to the ordinances on non-conforming uses, Defendant Briggs testified that the continual maintenance of a non-conforming use permits its perpetuation. Conversely, if the house is abandoned or vacant, the ordinances provide that the person loses the non-conforming use.

The ordinances also provide for the removal or surrendering of a non-conforming use by the City. Zoning Ordinance 5.776 permits the acquiring of property by the City after the loss of a non-conforming use. The City, however, has never used that particular section to acquire and then condemn non-conforming uses.

The pertinent Zoning Ordinance No. 5.73, pertains to discontinuance or abandonment of a non-conforming use and reads as follows:

> 5.73. *Discontinuance or Abandonment.* Any nonconforming use of land or building which has become vacant or remains unoccupied owing to abandonment or discontinuance for a period of six (6) months shall thereafter conform to the provisions of this chapter.

Despite the ordinance requiring that the failure to obtain a "C of O" within thirty days forfeits the non-conforming use, Mr. Briggs testified that the Building Department would not stringently enforce that provision as a matter of policy.

Zoning Ordinance 5.66(a) reads as follows:

> 5.66. *Certificate of Occupancy.*
>
> (a) At any time after the adoption of this Chapter should the City become aware of a nonconforming use, the owner of said nonconforming use shall be notified by the Building Inspector of the provisions of this section that his property constitutes a nonconforming use. Within thirty (30) days after receipt of said notice, the owner shall apply for and be issued a Certificate of Occupancy for the nonconforming use. The application of such Certificate shall designate the location, nature, and extent of the nonconforming use and such other details as may be necessary for the issuance of the Certificate of Occupancy.
>
> If the owner of a nonconforming use fails to apply for a Certificate of Occupancy within thirty (30) days after receipt of the foregoing notice, the use ceases to be nonconforming and is hereby declared to be in violation of this chapter. The Building Inspector and the

City Attorney shall take appropriate action to enjoin such violation.

Mr. Briggs testified that the City stringently enforced Ordinance 5.73 regarding the discontinuance or abandonment of the property. Mr. Briggs indicated he would consider a house vacant for six months if there was no furniture in the house, the house was not being utilized, mail would not come to the house and there was no activity indicating that an individual was residing there. Mr. Briggs testified that the forfeiture of a non-conforming use occurs automatically under the six month provision and is not a true question of enforcement. Mr. Briggs testified that the house was deemed vacant as of December 29, 1982.

Upon cross-examination, Mr. Briggs testified that in December of 1981, the file indicated that little kids were found to be playing in the house repeatedly and vandalism was occurring. In May, 1983, a fire occurred at the premises. As a result of the deterioration, the Plaintiffs received a Notice of Condemnation issued by the City of Dearborn Heights on June 29, 1983. That notice provided that the demolition would occur within thirty days of the notice unless, pursuant to Section 8.615, the Plaintiffs would file a written petition requesting a hearing within ten days of the notice accompanied by a $75.00 fee. Mr. Steeg filed an application, but withdrew it. The City refunded his $75.00 check.

The Plaintiffs took no further action. On November 4, 1983, a letter was sent to the Plaintiffs and their attorney from the Defendants to inform Plaintiffs that the property would be demolished unless something was done to restrain the City from doing so. The Plaintiffs took no action and on December 9, 1983, five months after the initial notice of condemnation, the house was demolished. Mr. Briggs testified that the policy for enforcing the ordinances for demolition was a lenient one

in 1981 through 1983 because of the status of the economy making it hard to sell a house and hard to obtain a mortgage. In actuality, Plaintiffs were granted a reprieve of a few years by the City within which to comply with the ordinance or seek relief at a higher court.

Plaintiffs filed the instant action in state court which resulted in a verdict in Plaintiffs' favor on the 42 U.S.C. 1983 claim. The jury awarded Plaintiffs $50,000.00 against the City and $50,000.00 against Defendant BRIGGS. The trial court granted Defendants' Motion for Judgment Notwithstanding the Verdict on the 42 U.S.C. 1983 claim. The trial court also granted Defendants' dispositive motions on the remaining claims prior to trial.

SUMMARY OF THE ARGUMENT

The trial court properly concluded that the Plaintiff did not state or support a claim under 42 U.S.C. 1983 for deprivation of property without due process under the 14th Amendment. First, the Plaintiff had adequate state remedies that were available and were in fact utilized in this case. Secondly, due process had not been violated because the process was adequate and appropriately followed in the instant case. For that reason, the Plaintiffs' federal claim was completely without merit and the trial court properly granted Defendants' Motion for a Judgment Notwithstanding the Verdict. Additionally, the remaining state claims that were filed by the Plaintiff were adjudicated in the state court and are not properly within the jurisdiction of this Court. Alternatively, those claims are also without merit.

ARGUMENTS

I.

THE TRIAL COURT PROPERLY ENTERED A JUDGMENT NOTWITHSTANDING THE VERDICT FOR THE DEFENDANTS WHERE THE PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A CONSTITUTIONAL VIOLATION PURSUANT TO 42 U.S.C. 1983 WHERE THE PLAINTIFFS WERE MORE THAN ADEQUATELY PROVIDED WITH DUE PROCESS PRIOR TO THE DEMOLITION OF THEIR PROPERTY.

This Court in *Parratt* v. *Taylor*, 451 U.S. 527; 101 S.Ct. 1908; 68 L.Ed.2d 420 (1981) addressed the necessary elements for maintaining such an action under 42 U.S.C. § 1983. In that case, the plaintiff brought an action under § 1983 for the loss of mail order hobby materials by prison officials. The plaintiff claimed that the loss gave rise to a § 1983 action for depriving him of property without due process of law. In finding that the plaintiff had not stated or proven a cause of action under 42 U.S.C. § 1983, the Court stated:

> Our inquiry therefore must focus on whether respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides is a means of redress for property deprivation to satisfy the requirements of procedural due process.
>
> * * *
>
> Although the state remedies may not provide the respondent with all of the relief which may have been available if he had proceeded under Section 1983, that does not mean the state remedies are not adequate to satisfy the requirements of due process.

> The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold they are sufficient to satisfy the requirements of due process. 451 U.S. 537; 68 L.Ed.2d 430, 434.

The principle of *Parratt* was extended in *Hudson* v. *Palmer*, 468 U.S. 517; 104 S.Ct 3194; 82 L.Ed.2d 393 (1984). In *Hudson*, the plaintiff alleged that he was deprived of his property by prison officials who had intentionally destroyed some of his personal property during the search of his cell. This Court decided that the plaintiff had failed to state a claim under § 1983 and extended the principle of *Parratt* as follows:

> We hold that an unauthorized intentional deprivation of property by a state employe does not constitute a violation of the procedural requirements of the due process clause of the fourteenth Amendment if a meaningful post-deprivation remedy for loss is available. 82 L.Ed.2d at 407.

In *Corder* v. *City of Sherwood*, 579 F.Supp. 1042 (E.D. Ark. 1984), the plaintiff sued the city under 42 U.S.C. § 1983 alleging the defendant city's refusal to issue building permits resulted in a violation of the plaintiff's constitutional rights under the Fourteenth Amendment. In finding that the plaintiffs had failed to state a claim under § 1983, the Court stated:

> Under Arkansas law, the chancery courts have the power to review zoning decisions and grant relief when a zoning decision is arbitrary, capricious, or unreasonable. An appeal from an adverse decision could be pursued through the Arkansas state court system. Therefore, the plaintiff's right to judicial review of a city councils' decision by state courts afford them protection from arbitrary, capricious, or

> unreasonable action and therefore affords them due process, as well as equal protection. 579 F.Supp at 1044.

In *Chiplen Enterprises, Inc* v. *City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983), a real estate developer brought suit against the city under 42 U.S.C. § 1983 alleging a violation of constitutional rights. The city denied the plaintiff a building permit, and only issued that building permit some five years after the original application and after plaintiff had been to the Supreme Court of New Hampshire. The gravamen of plaintiff's complaint was that the defendant denied the plaintiff due process by maliciously denying plaintiff a building permit for invalid and illegal reasons and in bad faith. In holding that the plaintiff had failed to plead or prove a claim under § 1983, the Court stated as follows:

> A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error. 712 F.2d 1528.

This same rule is followed in *Quinn* v. *Bryson*, 739 F.2d 8 (1st Cir. 1984); and *Pastan* v. *City of Melrose*, 601 F.Supp. 210 (D.C. Mass. 1985).

Further, cases have held that in 42 U.S.C. 1983 damage suits, the plaintiff has the burden of pleading and proving the inadequacy of state remedies. *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir. 1984).

In the instant case, there was no evidence presented that the Defendants' actions were improper in anyway. The Defendants had no interest in obtaining Plaintiffs' property, but merely enforced the City's ordinances. The evidence overwhelmingly established that the Plaintiffs failed to take any action available to them to remedy their circumstances.

Once the Defendants issued the citation, Plaintiffs had the obligation to assert their opposition or take action at the district court. Plaintiffs did absolutely nothing to protect their interests. The conviction and the eviction were carried out by the district court and its agents, who are not parties to this action.

Furthermore, the Defendants put Plaintiffs on notice of the loss of the non-conforming use. The Plaintiffs objected and appealed to the Zoning Board of Appeals. The Zoning Board of Appeals, a separate body that is not a named defendant, was the entity that denied Plaintiffs' request for a variance. With respect to the demolition, the Plaintiffs abandoned their objections of the demolition.

The finding of a violation of the Petitioners' civil rights in the instant case, where there was no genuine issue of fact, would result in a similar claim for any resident whenever an entity enforced its zoning or building ordinances. Petitioners were not deprived of all reasonable use of their property. The Petitioners have failed to cite authority for their assertions that they have an unrestricted constitutional right to repair their property. In fact, the Petitioners were never prevented from working on their house after they obtained the correct permits. Petitioner failed to establish that the City or its employees failed to provide the Petitioner with notice of their evaluations and notice of ways to appeal those matters. The municipal employees provided the Petitioners with every opportunity and encouraged the utilization of these opportunities to avoid the consequences that ultimately occurred. The City employees delayed their actions to give Petitioners as much time as possible. Evidence clearly established that the procedures followed by the Respondents were proper.

The Petitioners, who conceded that the ordinances were valid, were merely attacking the allegedly arbitrary decision of Respondent Briggs that Petitioners had abandoned the

non-conforming use. The law providing for a claim against the entity under 42 U.S.C. 1983 clearly prohibits the theory of *respondeat superior* liability. *Monell* v. *Dep't of Social Services*, 436 U.S. 658; 98 S.Ct. 2018; 56 L.Ed.2d 611 (1978). The Petitioners must establish that the entity has an unconstitutional policy, practice or custom. Evidence of a single incident is insufficient to constitute a policy. *Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985).

In the instant case, the verdict against the City cannot stand. It attempts to impose upon the City's vicarious liability for Briggs' actions. Such a finding is in direct contravention to *Monell*, *supra*. Moreover, Petitioners failed to establish any unconstitutional policy. Since Petitioners have relied on this one instance, their claim must fail.

Additionally, Respondent Briggs himself is entitled to qualified immunity. The question is one of law and the evidence overwhelmingly established that Respondent Briggs reasonably believed his actions were lawful and appropriate and that he took every opportunity possible to assist the Plaintiffs. *Guider* v. *Smith*, 431 Mich. 559; 431 N.W.2d 810 (1988). See also *Harlow* v. *Fitzgerald*, 457 U.S. 800; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982).

The trial court could have set aside the jury verdict as to Defendant Director Briggs on an alternative basis. The jury found that the Defendant Officer Dollian, who issued the citations, was not liable to the Plaintiffs. Where Defendant Briggs' contact with the Plaintiff was based on the same activity as that of Defendant Officer Dollian's, the verdict, with respect to Officer Dollian, is inconsistent with the verdict as to Defendant Briggs. The verdict against Defendant Briggs should be reversed on that basis. *Ealey* v. *Detroit*, 144 Mich. App. 324; 375 N.W.2d 435 (1975).

Furthermore, the Petitioners' argument for the imposition of such liability is not persuasive. They fail to cite authority in support of their position. At the lower courts,

the Petitioners relied on *Harrison* v. *Springdale Water and Sewer Corp*, 780 F.2d 1422 (C.A. 8th 1986). There, the Court concluded that the plaintiffs had stated a claim for a violation of civil rights where the plaintiffs alleged that their First Amendment right to access of the Courts was violated where they sought judicial intervention to preclude the pollution of their property by the city's sewage department. In retaliation, the city's employees harassed the plaintiffs with a counter-claim for condemnation. The city employees admitted that the counter-claim was filed only to pressure the plaintiffs into settlement and that the city was not interested in acquiring plaintiffs' property.

The Court in *Harrison* found that plaintiffs' substantive rights under the First Amendment were allegedly violated independent of a due process claim. Thus, the state remedy analysis was not at issue in *Harrison*.

In the instant case, the trial court properly granted Defendants' motion, as a matter of law, where the Plaintiffs failed to establish any evidence of a due process violation. The evidence established that a taking did not occur and the Plaintiffs conceded that the ordinances were constitutional. The evidence clearly established that the ordinances were constitutionally applied and that the Plaintiffs had adequate state remedies, ample notice, and more than adequate time to prevent the damage.

II.

THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON PLAINTIFFS' CLAIM ALLEGING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WHERE THE PLAINTIFFS WERE UNABLE TO ALLEGE OR SUPPORT CLAIMS OF OUTRAGEOUS CONDUCT AGAINST THE DEFENDANTS AND WHERE ANY SUCH CLAIM IS BARRED BY THE GOVERNMENTAL IMMUNITY DOCTRINE.

Respondents assert that this claim is a state claim and therefore should not be addressed by this Court. Alterna-

tively, Respondents assert that the Petitioners failed to establish a claim for intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress is established if the plaintiff can plead or support the following:

(1) Extreme and outrageous conduct;

(2) Intent or recklessness;

(3) Causation; and

(4) Severe emotional distress. *Roberts* v. *Auto-Owners Ins Co*, 422 Mich. 594, 597; 374 N.W.2d 905 (1985).

First, Plaintiffs were unable to support or allege facts that would constitute "extreme and outrageous behavior" by any Defendant herein. The testimony established that the actions of the individual employees consisted of the performance of their properly executed professional duties. The Defendant Officer merely issued citations and Defendant Director decided that the violations were based on sufficient facts while the district court judge determined that the violations occurred. Plaintiffs failed to allege or support facts evidencing any tortious conduct independent of the execution of Defendants' duties.

No evidence was presented to support a claim that the Defendant City's enforcement of its ordinances would constitute a claim for intentional infliction of emotional distress. The Defendant City is not directly or vicariously liable for the alleged torts of its employees. *Smith* v. *Dep't of Mental Health*, 428 Mich. 540; 410 N.W.2d 749 (1987). With regard to the individual Defendants, the Plaintiffs failed to establish any evidence of behavior that could be characterized as "extreme and outrageous".

Therefore, the trial court properly dismissed Plaintiffs' claim for intentional infliction of emotional distress where

the Plaintiffs' claim is based upon the dissatisfaction with the Defendants' performance of their legal and professional duties. To hold otherwise would permit residents of every entity to bring such a claim whenever they merely disagree with the outcome of their interactions with their local government. Plaintiffs were unable to allege or support facts constituting extreme or outrageous behavior by the Defendants.[2]

III.

THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR DIRECTED VERDICT WHERE PLAINTIFFS HAVE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH A *PRIMA FACIE* CASE OF INVERSE CONDEMNATION.

Respondents assert that the Petitioners' state claim of inverse condemnation would be barred by *res judicata* and collateral estoppel. *Boatman* v. *Motorists Mutual*, 158 Mich. App. 431; 404 N.W.2d 261 (1987). There, the Court denied the defendant no-fault insurer's motion for summary disposition on the basis that a "starting-gate" was not a motor vehicle and plaintiffs' injuries were not foreseeably identifiable with the normal use of a motor vehicle. The Court would not reopen the issue of entitlement to benefits because that issue was previously decided in a final order not appealed by defendant.

In the instant case, the conviction for the lack of C of O, which was final, may not be attacked collaterally in a civil matter. A final order was entered on the issue of whether a C of O was issued. The question was decided in the negative. Plaintiffs never appealed. *Kougoulas* v. *Sorlas*,

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[2] Alternatively, any tort claims are barred by governmental immunity. M.C.L.A. 691.1401 *et seq.*; M.S.A. 3.996(101) *et seq.* because Plaintiffs' claim does not fall within one of the statutes' enumerated exceptions to governmental immunity. *Id.*

252 Mich. 557; 233 N.W.2d 414 (1930); *Nawrocki* v. *Superior Court of Grand Rapids*, 8 Mich. App. 228; 154 N.W.2d 47 (1967).

In the instant case, the Plaintiffs admitted that the instant action was, in essence, an appeal of the City's decision with regard to their property. (TT, Vol. II, p. 111, D. Steeg). The Zoning Board of Appeals denied the Plaintiffs' request for a variance and the Plaintiffs did not appeal. (*Id*). The Plaintiffs did not appeal the judgment of September 24, 1981, where Plaintiff, DONALD STEEG, pleaded guilty for failure to have a "C of O" and the Judge ordered the premises vacated. (TT, Vol. III, p. 96, L. Dollian). The Plaintiffs did not appeal the citations issued, the alleged stop-work order for performing work without a permit, the decision and findings of the Zoning Board of Appeals, the condemnation, or the demolition. Therefore, the failure of the Plaintiffs to appeal these final judgments constitutes *res judicata* and collateral estoppel of the propriety of those actions or the effect of these prior proceedings.[3]

Alternatively, the trial court properly granted Defendant's Motion for Directed Verdict on the failure to establish a state claim for inverse condemnation.

The law is clear in the State of Michigan that in order to maintain an action for inverse condemnation, the Petitioners must prove that there remains no reasonable use of the property in its current zoning classification. In *Kirk* v. *Twp. of Tyrone*, 398 Mich. 429; 247 N.W.2d 848 (1976), the Court indicated that the following rule governs proof of the claim of confiscation of property without due process:

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[3] Alternatively, Defendants argue that the Circuit Court was without jurisdiction to decide questions of appeal or questions that should have been an appeal protesting the loss of the non-conforming use of the demolition of the property. M.C.L.A. 25.585(3); M.S.A. 5.2935(1); M.C.L.A. 125.585(11); M.S.A. 5.2935(6); M.C.L.A. 125.585(12); M.S.A. 5.2935(7).

> In *Kropf* we required the property owner claiming confiscation to prove that application of an existing ordinance to his property "precludes it's use for any purpose to which it is reasonably adapted." 391 Mich. 139, 163; 215 N.W.2d 179, 189. 247 N.W.2d at 854.

In *Reibel* v. *City of Birmingham*, 23 Mich. App. 732; 179 N.W.2d 243, 246 (1970), the Court defined confiscation as follows:

> A zoning restriction deprives the zoned property of any reasonable use and is, therefore, confiscatory if all permitted uses are so devoid of feasibility that the restriction has accomplished the destruction of usable value.

See, also, *Palmer* v. *Superior Twp*, 406 Mich. 137; 277 N.W.2d 475 (1975). Plaintiff must show the zoning classification precludes the use of the property for any purpose for which it is reasonably adapted; *Troy Campus* v. *City of Troy*, 132 Mich. App. 441; 349 N.W.2d 177 (1984). Furthermore, one of the accepted goals of zoning is the eventual elimination of non-conforming uses. *National Boatland, Inc* v. *Farmington Hills Zoning Board of Appeals*, 146 Mich. App. 380; 380 N.W.2d 472 (1985).

It has further been held by the Court that a municipality need not provide every property owner with the "best use" of his property as viewed by that property owner, but only with a reasonable use of that property. *City of East Lake* v. *Forest City Enterprises, Inc*, 426 U.S. 668, 96 S.Ct. 2358; 49 L.Ed.2d 132 (1976). The mere diminution of property value is further insufficient to support a claim of taking of property without just compensation. See *White Lake Twp* v. *Amos*, 371 Mich. 693; 124 N.W.2d 803 (1968); *Gackler Land Co, Inc* v. *Yankee Springs Twp*, 188 Mich. App. 1; 859 N.W.2d 226 (1984), aff'd, 427 Mich. 526; 398 N.W.2d 898

(1986); *Hart* v. *City of Detroit*, 417 Mich. 488; 331 N.W.2d 438 (1982).

At trial, the Plaintiffs did not contest the validity of the ordinances, only their application. (TT, Vol. III, p. 169, Plaintiffs' counsel). On appeal, Plaintiffs asserted that a taking occurred when the Defendant City prohibited the Plaintiffs from performing work without the issuance of a permit. Plaintiffs never challenged the citation prohibiting the performance of work on the premises for failure to obtain the requisite permit. Therefore, in addition to objecting to the newly raised issue not presented below, *Blue Water Isles Co* v. *DNR*, 171 Mich. App. 526; 431 N.W.2d 53 (1988), Defendants also assert that collateral estoppel precludes relitigation of the propriety of the issuance of that citation. *Peterson* v. *City of Lapeer*, 106 Mich. App. 148; 307 N.W.2d 744 (1981).

Furthermore, there was no evidence to establish a "taking" or that the City intended to "take" Plaintiffs' property. Plaintiffs attempted to establish that a City's improvement project was the ulterior motive for the City's actions as reflected by the demolition of two other houses. Plaintiffs' argument was unfounded as evidenced by the uncontroverted testimony that the houses were demolished at the request of the owner after incidents of vandalism and fire. (TT, Vol. III, pp. 92-93, L. Dollian). Furthermore, the houses were located two to three blocks away. There was no evidence presented of any City plan to condemn and obtain the surrounding area for its own purposes. Although Plaintiffs argued that they never knew the zoning of their property and presumed that it was residential, Mr. Steeg admitted that some change from residential to commercial was beginning as early as 1964-1967. (TT, Vol. I, pp. 95-96, D. Steeg).

The evidence clearly established that the Defendant, CITY OF DEARBORN HEIGHTS, and the individual Defend-

ants did not intend to "utilize" Plaintiffs' property and, in fact, attempted to encourage Plaintiffs and their attorney to take action. However, the Plaintiffs abandoned their appeals, applications and acquiesced to the progression of events. There was no evidence presented that Plaintiffs were deprived of all reasonable use of their property by the Defendants.

Additionally, the defense of *laches* is applicable where the Plaintiffs' failure to take action results in prejudice to the Defendants. The Plaintiffs took this action long after the damage was done. Even if these Defendants had the authority to alter events, the Plaintiffs' delay prejudiced the Defendants. The alleged damage could have been stopped or mitigated by Plaintiffs' actions early on. *In Re Crawford Estate*, 115 Mich. App. 19, 25-26; 320 N.W.2d 276 (1982).

Therefore, the Plaintiffs' claim of inverse condemnation is based upon the sequence of events relating to their property as a result of the Defendant City's enforcement of its zoning and building ordinances. The Plaintiffs conceded the validity of the ordinance, but never challenged their enforcement by the appeal process. Therefore, since the Plaintiffs concede the ordinances were valid and since the propriety of the citations remains intact, the Plaintiffs have failed to establish any evidence of misconduct. Permitting a claim under these circumstances completely disrupts the entity's ability to implement its police powers. The only option available to the entity and its employees is to ignore enforcement of the zoning violations. Therefore, the trial court properly granted Defendants' Motion for Directed Verdict where the Plaintiff was unable to establish an unconstitutional taking of its property and the Defendant, CITY OF DEARBORN HEIGHTS, was entitled to judgment as a matter of law.

IV.

ALTERNATIVELY, THIS COURT COULD REVERSE THAT PORTION OF THE APPELLATE DECISION ENUNCIATING THE PROPOSITION THAT PLAINTIFFS NEED NOT SEEK REDRESS IN ADMINISTRATIVE/STATE PROCEEDINGS AS A PREREQUISITE TO SEEKING DAMAGES.

Respondents assert that the following statement by the Court of Appeals subsequent to that portion of the decision is not a correct enunciation of the law in Michigan:

> We note initially that plaintiffs were not required to seek a variance or to appeal the zoning board's decision as a prerequisite to their complaint. The taking claim is separate from the seeking of a variance. *Bevan v. Bradon Twp*, 176 Mich App. 452, 457; 440 N.W.2d 31 (1989). (Opinion, page 5).[4]

In *Electro-Tech v. Campbell Co*, 433 Mich. 57; 445 N.W.2d 61 (1989), Defendants-Appellees assert that the Michigan Supreme Court concluded that there were two elements to the requirement of finality. *Electro-Tech*, 433 Mich. at 81, 87. The first element is that the "plaintiff obtain a final decision regarding the application of the zoning ordinance and subdivision regulation of its property." *Id*, at 81. The Court relied on *Williamson Co Regional Planning Comm v. Hamilton Bank of Johnson City*, 473 U.S. 172; 105 S.Ct. 3108; 87 L.Ed.2d 126 (1985).[5]

Later, notwithstanding its continued reference to *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 550; 102 S.Ct. 255; 73 L.Ed 172 (1982), the Court in *Electro-Tech* relied on the second finality requirement set forth in *Williamson* stating

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[4] This case is currently on appeal before the Michigan Supreme Court, 176 Mich. App. 452; 440 NW2d 31 (1989), lv. grtd., 434 Mich. 881 (1990).

[5] In *Electro-Tech*, the Court realized that a "taking" claim is different from a 42 U.S.C. 1983 claim. In *Electro-Tech*, the Court concluded the taking claim was not ripe where the plaintiff failed to receive the final decision from the defendant.

that a "taking claim is not ripe until a plaintiff has sought compensation through state procedures." *Electro-Tech*, 433 Mich. at 87. Thus, Respondents assert that the Petitioners must seek redress in the administrative/state remedies before seeking relief pursuant to 42 U.S.C. 1983 or under a state taking claim.

Respondents assert that Petitioners must exhaust their administrative/state remedies prior to seeking damages under either a 1983 claim or a state taking claim. A result to the contrary mandates that the state courts become a zoning board of appeals. Moreover, Petitioners will now be asserting that this super board of zoning is entitled to issue damages whenever they disagree with the planning commission, ZBA, or the building inspector's decision. As a practical matter, this is blatantly unfair to impose liability against an entity when the Petitioners have not proceeded through the complete administrative process. If the planning commission or building inspector denied a permit or a zoning change, this decision may be reversed by subsequent actions on the part of a different department within the City.

A result to the contrary has the state courts entangled in building and zoning problems of local entities with resulting confusion. The imposition of damages when the Courts subsequently disagree with the local boards, commissions, building inspectors, etc. without the necessity of completing the process within the entity subjects local municipalities to horrendous damage awards.

The instant case is a perfect example of the need for the Petitioners to exhaust their administrative/state remedies. The Petitioners in the instant case had ample notice as to every step that the City was going to take. The employees and the City informed the Petitioners and encouraged the Petitioners to proceed forward in some manner in order to avoid the consequences of their inaction. The Petitioners failed to do anything.

Moreover, although the Petitioners brought suit against the "City" and the "building director," Petitioners were attacking the actions of non-parties to the lawsuit. The Petitioners attacked the District Court Judge's Order removing the tenants from the building because of a lack of a certificate of occupancy. The Petitioners attacked the determination that the nonconforming use had been abandoned, but failed to appeal the Board's denial of their variance to give them additional time to bring the building up to code. Moreover, the City, through its building director, gave the Petitioners an exorbitant amount of extra time to cure the problems.

Respondents also assert that these prior proceedings constitute collateral estoppel and *res judicata* on these issues where the Petitioners failed to take subsequent appropriate, appeal action. Thus, Respondents assert that the Petitioners must seek redress in their administrative/state remedies prior to seeking relief at the Courts for damages under either a 42 U.S.C. 1983 or a taking claim. For that reason, Respondents assert that the Court of Appeals was incorrect in concluding on page 5 that seeking a variance or appeal to the zoning board of appeals was not a prerequisite to the filing of the Complaint.

CONCLUSION

The trial court's Order granting summary disposition of Plaintiffs' claim for intentional infliction of emotional distress was proper where Plaintiffs were unable to allege or support evidence of "extreme and outrageous" behavior. Further, Plaintiffs' claim would be barred by the governmental immunity doctrine.

The trial court correctly granted the Defendants' Motion for Directed Verdict of Plaintiffs' claim for inverse condemnation, labeled "Condemnation," where the Plaintiffs were

unable to establish, as a matter of law, that a "taking" occurred because Plaintiffs were not deprived of all reasonable use of their property, but merely attacked the loss of their non-conforming use.

Petitioners' claim for a violation of their civil rights pursuant to 42 U.S.C. 1983 must fail when the evidence established only that the Petitioners were afforded ample notice and opportunity to challenge the actions of the Respondents taken pursuant to the constitutional ordinances that were uncontrovertedly constitutionally applied.

Lastly, Respondents submit that if this Court should grant the Petitioners' Petition for Writ of Certiorari, then the Court should also consider whether the appellate court erroneously concluded that the Petitioners did not need to seek review and exhaust their administrative/state remedies prior to the filing of this action.

RELIEF REQUESTED

Based upon the foregoing the Respondents CITY OF DEARBORN HEIGHTS, JAMES R. BRIGGS and LOUIS DOLLIAN respectfully prays that this Honorable Court deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

By: /s/ MARCIA L. HOWE (P-37518)
Counsel of Record
33900 Schoolcraft Road
Livonia, Michigan 48150-1392
(313) 261-2400

Attorneys for Respondents

Dated: April 25, 1991